Litigation against a Foreign Sovereign in the United States to Recover Artworks on Temporary Loan: The Malewicz Case

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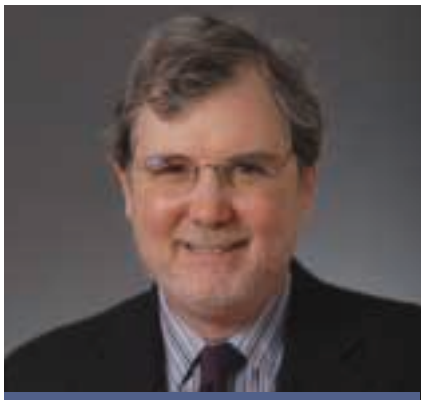

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A European government-owned museum lends a number of artworks to two American museums for temporary exhibition. The borrowing museums were careful to secure the necessary certifications from the United States Department of State to ensure that the artworks would be immune from seizure by any U.S. court. Shortly before the exhibition closes and the works returned to the lender, however, an action is commenced in a federal court in the United States against the lender-government by claimants seeking to recover the artworks, who assert that they were wrongfully expropriated from their family fifty years earlier. The claimants' assertion of jurisdiction over the government-lender is based, in part, on the presence of the artworks in the United States pursuant to the loan that had been immunized from judicial seizure. The lender-government moves to dismiss the lawsuit, claiming that since the artworks were present in the United States pursuant to a grant of immunity from seizure by the U.S. Government, such presence cannot serve as the basis for jurisdiction over the government-lender in a suit to recover the artworks. The United States Government submits a formal Statement of Interest to the Court, indicating its concern that a government that loans artworks for exhibition to the United States would be unlikely to expect that after securing immunity from judicial seizure; it could still be subject to a lawsuit in the United States to determine ownership of the artworks.

This was the situation facing the District Court of the District of Columbia in the recently-decided case of *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.C. Cir. 2005). Since the issues determined by the Court concern important questions relating to sovereign immunity and extraterritorial jurisdiction, and because of the global interest in the increasing number of cases involving Nazi-looted and other allegedly stolen cultural property, this article will briefly describe the main facts and pertinent legal issues of that case.

But first, a word about the author and context of this article. The author and his law firm, along with Thomas R. Kline and L. Eden Burgess of Andrews Kurth LLP in Washington D.C., represent the claimants in the *Malewicz* case. All of the facts and legal issues discussed in this article are based on the record in the case, including the claimants' complaint, as recited by the Court in its opinion. The City of Amsterdam will likely dispute many of the facts alleged by claimants and ultimately they would be determined by the Court at trial.

Before focusing on the facts of the *Malewicz* case and the important issues determined by the Court, it would be helpful to briefly explain the pertinent provisions of the United States Immunity from Seizure Act as well the Foreign Sovereign Immunity Act ("FSIA"), both central to the Court's decision.
In 1965, Congress enacted the Immunity from Seizure Act with the intention of ensuring the protection from judicial seizure of artworks loaned to museums and similar institutions located in the United States. Pursuant to this federal statute, 22 U.S.C. §2459, any not-for-profit museum or other exhibitor may apply to the U.S. Department of State for a determination that art to be loaned from abroad for exhibition is culturally significant and that the exhibition is in the national interest. If the application is granted, the art is automatically immunized from judicial seizure by the federal government. In order to obtain a determination that the loan of the artworks is in the national interest, the applicant must certify that it has undertaken professional inquiry, including independent, multi-source research into the provenance of the objects being loaned. The applicant also must certify that it does not know, or have reason to know, of any circumstances with respect to any of the objects that would indicate the potential for competing claims of ownership, or, for objects for which such circumstances do exist, the applicant must describe those circumstances as well as the likelihood as to whether any such claim would succeed. See U.S. Department of State Website, Statute Providing for Immunity from Judicial Seizure of Certain Cultural Objects (22 U.S.C. 2459), Checklist for Applicants, *available at* ***www.state.gov/s/l/3196.htm.***

With regard to sovereign immunity, United States law is clear that a foreign sovereign is not immune from suit in the United States simply because of its sovereign status. However, this was not always the case. Traditionally, the United States followed the "absolute theory" of sovereign immunity, which embodied the principle that the government of a nation, state or other political subdivision could

not be subjected to process in a court of law without its consent. For more than 150 years, U.S. law granted complete immunity from suit to foreign sovereigns. *See* Thomas H. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 Fordham L. Rev. 155, 165 (1981). As the U.S. moved away from an "absolute theory" of sovereign immunity, American courts began to develop the practice of seeking advice from the executive branch of the U.S. Government on the question of sovereign immunity. This practice was based on the principle that the executive branch had a "constitutionally mandated prerogative of action in the field of foreign relations, and in part on a reluctance to embarrass the executive in its conduct of foreign policy." *Id.* at 174. However, it soon became apparent that the Department of State's "suggestions of immunity" were deficient, as they were lacking in consistency and principle and unable to be used as precedent because they lacked a clear objective or policy. *Id.* at 175.

In 1952, the U.S. issued the "Tate Letter", a letter from Jack B. Tate, the Acting Legal Advisor of the Department of State, to the Acting Attorney General. This letter advised the Justice Department that henceforth the Department of State would "follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." Letter from Jack B. Tate to the Acting Attorney General (May 19, 1952), in *26 Dep't State Bill. 984* (1952). Though this was a major shift in U.S. policy and legal practice, the Tate Letter was difficult to implement because it provided no criteria for the application of this "restrictive theory" of sovereign immunity.

The restrictive theory extends immunity to foreign sovereigns only in legal actions arising out of acts that are governmental in nature *(acta jure imperii)*. Sovereigns are not granted immunity, however, in cases that arise from acts that are commercial or private in nature *(acta jure gestionis)*. In 1976, the restrictive theory of sovereign immunity was codified in the FSIA, *28 U.S.C. §§ 1602, et. seq*. The FSIA shifted to the courts the exclusive responsibility for adjudicating claims of sovereign immunity.

The FSIA provides that a foreign state and its agencies and instrumentalities are immune from jurisdiction in United States courts **unless** certain exceptions apply, all of which are set forth in *28 U.S.C. § 1605 (a) - (e)*. These exceptions include any case (1) "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *(28 U.S.C. § 1605 (a)(2))*; and (2) "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state". *(28 U.S.C. § 1605 (a)(3))*.

The *Malewicz* case was brought pursuant to this last FSIA provision. Plaintiffs in that case are the heirs of the world-renowned Russian artist Kazimir Malewicz, who allege that the City of Amsterdam (a political instrumentality of the Kingdom of the Netherlands), through the City-owned Stedelijk Museum, wrongfully expropriated 84 Malewicz artworks in violation of international law. The facts alleged by the plaintiffs are set forth in the complaint and recited in the Court's opinion at 362 F. Supp. 2d at 300-304; we briefly summarize them here.

In 1927, Malewicz brought more than one hundred of his paintings, drawings and other works to Berlin where many were exhibited at the prestigious *Berliner Kunstausstellung*. In June of that year, Malewicz was unexpectedly called back to Leningrad and could not take his artworks with him. Since he expected to soon return to the West, he entrusted them for safekeeping to several friends in Germany. The *Berliner Kunstausstellung* closed in September 1927 and all of the Malewicz works were packed and stored in Berlin. Years later, the works were transferred from the facility where they were being kept to one of Malewicz's friends, Dr. Alexander Dorner, to whom he had entrusted the works. At that time it would have been futile to return the works to Malewicz in the Soviet Union because Stalinist condemnation of abstract art would undoubtedly have led to their confiscation and eventual destruction.

For some time, Dorner exhibited some of the works at the *Landesmuseum* in Hannover. The Nazis' attacks against "degenerate art" and their ultimate ascension to power, however, compelled him to conceal the works in the museum's basement. Before Dorner fled Germany in 1937, he took steps to ensure that the Malewicz works he was leaving behind would be kept secure for the benefit of Malewicz's Heirs. Malewicz had died in 1935 and the Malewicz name and his Suprematist art were anathema in Stalinist Russia. The majority of the German friends to whom he had entrusted his works in 1927 had already fled or, like Dorner, were about to leave Germany - all that is, but one: Hugo Häring who lived and worked in Berlin. Therefore, Dorner had the crate of paintings and drawings sent to Häring, to whose care alone the works were now entrusted. Häring safeguarded the works in Berlin, until the bombing of the city in 1943, and then in his native town of Biberach. During the time that the works were in Biberach, Häring's friends attempted to convince him to secure the works against loss or dispersal by entrusting them to the care of a museum. For years Häring refused to do so, repeatedly emphasizing that he was only the custodian of the works, responsible for their safekeeping, and that he had no right to transfer them to anyone else.

In 1956, after a prolonged illness, Häring finally agreed to lend the works to the Stedelijk Museum, whose Director had been attempting for years to persuade him to sell or, at the very least, lend the works to the museum. Häring entered into a loan contract with the Stedelijk "that contained an option to purchase the Malewicz Collection". 362 F. Supp. 2d at 303. Plaintiffs' complaint alleges that the documents on which this loan contract was based - which purported to effect transfer of the ownership of the artworks from Malewicz to Häring upon Malewicz's death - were obvious frauds and were known by the Director of the Stedelijk to be frauds because of his prior correspondence with Häring, who had never claimed that Malewicz intended to transfer the collection to Häring upon Malewicz's death. *Id.* Despite the fact that the Stedelijk was fully aware that Häring did not own the Malewicz artworks, the Malewicz collection has been housed at the museum since 1958.

In 2003, fourteen of the eighty-four artworks in the Malewicz Collection at

the Stedelijk were exported to the United States to be part of a temporary exhibition at the Solomon R. Guggenheim Museum in New York City (from May 22, 2003 until September 7, 2003) and the Menil Collection in Houston (from October 2, 2003 until January 11, 2004). Prior to the exhibition, the U.S. Department of State had made the necessary certifications pursuant to the Immunity from Seizure Act and therefore the artworks were immunized from judicial seizure. As noted above, the Malewicz Heirs' suit in the United States was brought under the FSIA's expropriation exception, *28 U.S.C. § 1605 (a)(3)*, which provides that a foreign state (including a political subdivision thereof) shall not be immune in a case, "in which rights in property taken in violation of international law are in issue and that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state." The Heirs argued that (I) the defendant, the City of Amsterdam, through the Stedelijk Museum, took the Malewicz artworks without compensation to them, their true owners, none of whom was then or thereafter a citizen of The Netherlands; (II) at the time when the action was commenced in January 2004, the fourteen Malewicz works at issue were on exhibit at the Menil Museum in Houston, Texas, and were therefore "present in the United States," vesting jurisdiction over them in the United States pursuant to *§1605 (a)(3)* and (III) because the loan of the fourteen artworks to the Guggenheim and the Menil Museums was a transaction or act that could be engaged in by a private party, it comprised a "commercial activity" under the FSIA.

The City of Amsterdam moved to dismiss the Heirs' complaint, arguing, *inter alia*, that they could not claim a violation of international law because they had not exhausted their remedies in a court in The Netherlands; the artworks were not "present in the United States" as a matter of law during the course of the exhibitions because they had been federally immunized from seizure; and that the loan of the Malewicz artworks to the U.S. museums was not a "commercial activity carried on in the United States" as the FSIA requires.

In an opinion dated March 30, 2005, the U.S. District Court for the District of Columbia denied the City's motion to dismiss. First, the Court found that the City's arguments concerning exhaustion of remedies were not a basis for dismissing the suit on jurisdictional grounds because the Court could "not require Plaintiffs to take their case to a Dutch court unless the City of Amsterdam waiv[ed] its statute of limitations defense and the Dutch court accept[ed] that waiver." *Malewicz*, 362 F. Supp. 2d at 308. Second, the Court held that the paintings were present in the United States at the time of the filing of the suit and therefore were present for purposes of FSIA jurisdiction. The works' immunization from seizure did not negate their presence in the United States for FSIA purposes. Lastly, as to whether the exhibition loan was a "commercial activity," the court based its analysis on the "rule of thumb" adopted by the courts in the District of Columbia: "If the activity is one in which a private person could engage, it is not entitled to immunity." *Id.* at 313. Consequently, the Court concluded that it was "clear that the City of Amsterdam engaged in 'commercial activities' when it loaned the 14 Malewicz works to museums in the United States" because there is "nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign." *Id.* at 314. As the Court explained, even if the loan were purely educational and cultural in purpose, as the City alleged, it still would be "commercial activity" under the FSIA, citing the language of the FSIA itself: "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." FSIA, *28 U.S.C. §1603(d).*

It is interesting to note that the U.S. Government filed a Statement of Interest in the case, contending that "*§1605 (a)(3)* requires a sufficient nexus with the United States to provide fair notice to foreign states that they are submitting themselves to U.S. jurisdiction and abrogating their sovereign immunity" and that "foreign states are unlikely to expect that this standard is satisfied by a loan of artwork for a U.S. Government-immunized exhibit that must be carried out by a borrower on a non-profit basis". The Court responded to these arguments by stating that although "the opinions of the United States are entitled to 'great weight'", the Court "concludes that *§2459* granting immunity and *§1605(a)(3)* establishing jurisdiction for certain claims against a foreign sovereign are both clear and not inconsistent" and therefore "the Court is bound to the plain meaning of these statutes", that is, that they are "unrelated except that a cultural exchange might provide the basis for contested property to be present in the United States and susceptible, in the right fact pattern, to an FSIA suit." *Malewicz*, 362 F. Supp. 2d at 311.

There is one issue that the Court left open for its later decision. On the factual record before it, the Court could not ascertain the substantiality of the City's contacts or activities with or in the United States in connection with the loan of the Malewicz artworks, which the Court held was required by the relevant definition of "commercial activity" in the FSIA itself: "'A commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States". FSIA, *28 U.S.C. §1603(d).* Therefore, although it denied the City's motion to dismiss, the Court requested further development of the factual record in order to make a final determination of the substantiality of the city's contacts with the United States and conclusively determine the question of whether or not the City of Amsterdam was immune from suit and thus whether or not the Court had jurisdiction to hear the case.

Although the Court will make a further determination regarding the substantiality of the City's contacts with the United States, it did resolve key issues raised in the case concerning the FSIA and the Immunity from Seizure Act. We expect that its determination will be cited in future cases involving these questions.

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[1] The author wishes to express his appreciation to his associate, Mari-Claudia Jimenez, Esq., for her excellent assistance in the preparation of this article.

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